PP

v.

MUHAMMAD RASID HASHIM

HIGH COURT MALAYA, SHAH ALAM
ABANG ISKANDAR J
[CRIMINAL TRIAL NO: 45-31-2006]
15 NOVEMBER 2009

CRIMINAL LAW: *Penal Code - Sections 302 and 376 - Murder and rape - Circumstantial evidence - Deceased raped and murdered - Whether prosecution established prima facie case - Whether defence raised reasonable doubt - Whether circumstantial evidence suggested or lent support to inference of guilt - Keys to deceased apartment found on accused - Accused trying to escape arrest by police - Accused seen standing near deceased apartment - Accused DNA found on murder weapon and on deceased - Injuries suffered by deceased not self-inflicted and were defensive wounds - Whether lies perpetrated by accused corroborated his guilty mind - Whether injuries sustained by deceased led to inference of non-consensual sexual intercourse - Whether absence of fingerprint evidence inconsequential*

EVIDENCE: *Circumstantial evidence - Conduct - Accused charged with murder and rape - Whether conduct of accused amounted to unequivocal evidence of guilty state of mind - Proper inference to be drawn from conduct of accused - Whether evidence of such conduct admissible under s. 8 of Evidence Act 1950*

EVIDENCE: *Circumstantial evidence - Securing conviction of - Consideration of evidence in its entirety - Murder and rape - Whether led to conclusion that accused and no one else had raped and murdered victim*

EVIDENCE: *Fingerprint evidence - Charge of murder and rape - Presence of evidence of positive mixed DNA profile match-up between accused and deceased - Whether absence of physical fingerprints of accused inconsequential*

The deceased ('Siti Zawiah') was supposed to return to Kelantan in the evening of 9 March 2006 after having stayed a few days with her friends Nur Hanani (SP3) and Zalina (SP4) at their apartment in Rawang, Selangor. On the day in question, SP3 and SP4 had left for work. The deceased was supposed to have met

A SP4 at the bus station in the evening to return the apartment keys to SP4 and leave for Kelantan. However, that evening the deceased did not turn up at the bus station. SP4's calls to the deceased handphone were not answered but her SMSes to the deceased were answered to the effect that the deceased was
B caught in a traffic jam on her way to the bus station. The deceased never turned up. Around midnight, SP3 and SP4 returned home and found the apartment door locked. They found the deceased inside a room writhing in pain on the floor with blood all over her head. A piece of rafia string was tied loosely
C round her body, her sarong had been raised to her waist and her shirt had been pushed upto her chest. The deceased later died upon being brought to the hospital. The accused was later charged under s. 376 of the Penal Code ('the Code') for the rape and under s. 300 of the Code for the murder of the deceased.
D The accused made his defence by way of an unsworn statement from the dock (D64). According to the accused, on the day of the incident, he and a friend called Roslan had approached the deceased to borrow some money from her. However, the deceased had in a loud voice asked them to leave her alone. The
E accused had therefore, without himself realizing, covered the deceased's mouth and pushed her into the house to stop her from shouting. The deceased then ran into a room and the accused and Roslan followed her into the room to calm her down. The appellant then could not remember what happened, but when he
F finally came to, he saw blood on the deceased's head and found Roslan standing beside the deceased. The deceased was lying motionless on the mattress with her sarong pushed down to her ankles and clad in only her underwear and a T-shirt. The accused then had proceeded to fondle her breasts and ejaculated in the
G direction of her private part. He later put his middle finger into the deceased's private part twice. However, according to the accused, when he saw blood flowing out from the deceased's head he panicked and quickly left the room. On the way out, the accused said that he took a purse, a handphone and some keys
H (belonging to SP4) which he found there. According to the accused, Roslan was still inside the house when he left.

Held (convicting and sentencing the accused on both charges):

I

(1) The set of keys belonging to SP4 were among the items seized from the accused when he was arrested a few days after the accident. The circumstances surrounding the

positive identification of the keys by SP4 led to the inference that the accused must have taken the keys from the possession of the deceased and that he must be the person who had locked up the doors to the apartment on the fateful night. It would have been impossible for the deceased to have locked all the doors because, no keys were found in the room where she was found lying on the floor. (paras 16 & 17)

(2) The accused had tried to escape arrest by the police. Although the evidence of conduct as envisaged under s. 8 of the Evidence Act 1950 may be relevant as proof of the guilty state of mind of an accused person, taken alone it may not be unequivocal evidence thereof. But if it is taken together with other available evidence before the court, its probative value will invariably be greatly enhanced towards establishing the same. The fact that the accused had attempted to take flight seen together with the fact that SP4's keys were found on the accused further bolstered the inference that he was concerned with the incident involving the deceased a few days prior. (para 18)

(3) Encik Sukri (SP11) who was staying at the same apartment, testified that on 9 March 2006 at about 2.30pm he had walked pass the accused whom he saw standing on the stairs near the second floor of the apartment. He also saw the deceased standing in front of the door of SP4's apartment unit. SP11 was quite familiar with the accused by sight and had positively identified the accused at the ID parade without much difficulty. (para 19)

(4) It was the accused who had instructed the deceased to reply to the SMSes. There was no cross-examination on this crucial part of SP4's evidence and therefore it must be accepted as true. All the replies to SP4's SMSes were lies concocted by the accused. These lies were deliberately perpetrated by the accused and were corroborative of his guilty mind in the commission of the offences; *Syed Ali bin Syed Abdul Hamid v. PP* (refd). (paras 21 & 22)

(5) The injury which most likely caused the death of the deceased was the injury to her forehead which was caused by a hard blunt object with a flat surface and a sharp edge such as an electric iron. P10B (the electric iron which was

found at the scene) could have caused such injury suffered by the deceased on the forehead because a swab of sweat taken from the broken handle of P10B showed that the mixed DNA profile developed therefrom had been contributed by the accused and the deceased. Thus, it could be inferred that the accused and the deceased must have grappled on the electric iron by its handle and the deceased must have tried to resist the accused's attempt to use it to hit her, but to no avail. (para 23)

(6) A swab taken from the chest of the deceased had been a mixed DNA profile contributed by both the accused and the deceased. The breaking of the hyoid bone of the deceased must have been caused by the accused in the struggle between him and the deceased and in his quest to force her into submission he must have strangled her. The said struggle, in all probability, had resulted in his sweat falling on the chest of the deceased causing it to mix with the deceased sweat, thus accounting for the mixed profile. As such, the fatal head injury and the fatal break of the hyoid bone were caused intentionally to cause the death of the deceased, by the accused. The injuries suffered by the deceased were not self-inflicted and were defensive wounds. (para 24)

(7) DNA profiling of the white coloured liquid found in the private part of the deceased was found to have come from the same source as the blood specimen of the accused. Thus, it could be reasonably inferred that the accused had penetrated the private part of the deceased and had ejaculated his sperm inside her. From the kind of injuries sustained by the deceased, the only reasonable inference that could be deduced therefrom was a *prima facie* indication of the non-consensual sexual intercourse between the accused and the deceased. (para 27)

(8) The ingredients of s. 300 of the Code had been established by the prosecution. The intention to kill could be amply inferred from the physical evidence which were recovered from the scene. (para 32)

(9) As no traces of Roslan's DNA was profiled from the human stains retrieved from the person of the deceased or from the specimens retrieved from the various exhibits recovered at the scene of crime, the accused's allegation that Roslan was present during the incident and the suggestion that Roslan could be involved in the fatal attack on the deceased, was entirely baseless. (para 45)

(10) Positive identification on a person can be achieved by way of techniques other than the 'traditional' mode of physical fingerprint uplifting. The presence of the overwhelming evidence in the form of positive mixed DNA profile match-up between the accused and the deceased rendered the absence of physical fingerprints of the accused inconsequential. (para 48)

(11) The defence had failed to create any reasonable doubt on the prosecution's case with respect to both the charges. D64 had been conveniently created by the accused as an afterthought, solely for the purpose of trying to exonerate himself. (para 56)

(12) In order to convict an accused person for murder in a case based on circumstantial evidence, such evidence must be strong enough, if taken together to make a proverbial rope equally as strong, to hang the accused person. In this case, the circumstantial evidence had, taken together, formed a rope strong enough to hang the accused for the murder. The rope was also strong enough to 'whip' and imprison the accused for the rape. The prosecution had succeeded in proving its case against the accused person beyond reasonable doubt on both the charges. (para 57)

Case(s) referred to:

AEG Carapiet v. AY Derderian AIR [1961] Cal 359 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Browne v. Dunn [1983] 6 The Reports 67 ***(refd)***
Chua Beow Huat v. PP [1968] 1 LNS 24 HC ***(refd)***
Eade v. The King [1924] 34 CLR 154 ***(refd)***
Ghulam Mustafa Gahno v. Emperor AIR [1939] Sin 182 ***(refd)***
Harpal Singh AIR 1981 SC 361 ***(refd)***
Krishnan Marimuthu & Anor v. PP [1982] CLJ 186; [1982] CLJ (Rep) 152 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Madan Gopal Kakkad v. Nanal Dubey [1992] 3 SCC 204 ***(refd)***

A *Mahadeo Ganpad Badawans AIR [1977] SC 1998* ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohamed Salleh v. PP [1968] 1 LNS 80 FC ***(refd)***
Mohd Abbas Danus Baksan v. PP [2006] 3 CLJ 880 CA ***(refd)***
B *Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC* ***(refd)***
Nga Khan AIR [1921] LB 4 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
C *Regina v. Lucas (Ruth) [1981] 3 WLR 120* ***(refd)***
Saminathan & Ors v. PP [1955] 1 LNS 138 HC ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 FC ***(refd)***
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***
D *Wong Swee Chin v. PP [1980] 1 LNS 138 FC* ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A(2)
Evidence Act 1950, s. 8
Penal Code, ss. 300, 302, 376

E **Other source(s) referred to:**
Modi on Medical Jurisprudence and Toxicology, 21st edn, p 369
Parikh, *Parikh's Textbook On Medical Jurisprudence and Toxicology*, 5th edn, p 439
Ratanial & Dhirajlal's Law of Crimes, 24th edn, pp 1798 - 1799

F *For the prosecution - Naziah Mokhtar, DPP*
For the accused - Dato' Taquiddin; Taquiddin & Partners

Reported by Amutha Suppayah

G

JUDGMENT

Abang Iskandar J:

H **A Brief Introduction**

[1] The undisputed facts as could be gleaned from the evidence coming from the prosecution's witnesses are as follows:

[2] Siti Zawiah was supposed to go back to Kelantan in the I evening of 9 March 2006 after staying in a few days with her friends Nur Hanani bte Abdul Halim (SP3) and Zalina bte Aziz (SP4) at their apartment no. 02-04 Blok Kekwah, Apartment

Dahlia, Bandar Country Homes, at Rawang, Selangor. Both Nur Hanani and Zalina had left her alone in the apartment after they had left off to their respective work places in the morning. SP4 had left her set of keys to the apartment with Siti Zawiah which the latter was to hand over to SP4 when they met up at the bus station in Rawang later in the evening, where Siti Zawiah was to catch a bus on her way back to Kota Bharu. That was the proposed and professedly agreed plan between them.

[3] But when SP4 called Siti Zawiah in the evening to remind her of their meet up at the bus station at Rawang town, there was no answer and although her subsequent SMSes (short messaging service) to Siti Zawiah were answered to the effect that she was on her way to the station but was caught up in a traffic jam as it was raining, Siti Zawiah never turned up at the station as planned earlier. At about 8pm that night, SP4 then headed for home to her apartment, having waited for Siti Zawiah in vain.

[4] When SP3 arrived at the front of her apartment at about 12 midnight, she opened the grille door. She then went on to enter into the hall in her apartment through the wooden door. After switching on the light she saw Siti Zawiah's bag was still in the living hall in the apartment. As she proceeded further inside the apartment, she heard a noise that sounded like someone breathing heavily but slowly, as if in exhaustion after a run, coming from inside the apartment but she could not tell its exact source. As she tried to hear more closely, she heard her neighbour's apartment's door being opened and shortly afterwards, she saw Zalina (SP4) and her neighbour standing at the door of their apartment. Zalina told her that she had no key to open the apartment's door, as she had left her keys to Siti Zawiah. SP3 said at that point in time, the noise had become louder and all of them were too scared to proceed further into the apartment. At that time too, a man whom they knew as "Boy" happened to come up the stairs on his way up the apartment block and they had asked him to accompany them to enter into the apartment, to which he had obliged. By then, they could already tell that the noise had come from inside Zalina's room but when they tried to open the door to the room, they found that it was locked. SP3 managed to locate the spare key to that room and with it they managed to open the door. They then switched on the light in the room and to their horror and shock they saw Siti Zawiah was

writing in pain on the floor in the room. She said that she saw blood all over Siti Zawiah's head and there was a piece of rafia string that appeared to have been tied loosely round her body. The sarong that Siti Zawiah was wearing had been raised to her waist and the shirt that she was wearing had been pushed upto her chest and half her hair have covered her face.

[5] After appropriately covering Siti Zawiah, they brought her to the Selayang Hospital with the assistance of Zalina's auntie. Both SP3 and SP4 went to the Police Station at Rawang to lodge a report and were later informed that Siti Zawiah had died shortly after arrival at the said hospital.

[6] So, what had happened? And who could have caused and brought this untimely death to Siti Zawiah, in this gruesome and tragic manner? The prosecution believed that after due investigations, they had the answers to those questions. Based on those answers, the prosecution had filed in this court, a charge (P2) for the offence of murder under s. 300 of the Penal Code, against one man by the name of Muhammad Rasid bin Hashim ('the accused') and in the course of proceedings, at prosecution's stage, the prosecution had filed a further charge (P11) for the offence of rape under s. 376 of the Penal Code against the accused. For ease of reference, the charges as they had appeared in P2 and P11 are hereby reproduced in their original language respectively, as follows:

[7] The 'murder charge' marked as P2 and read: "Bahawa kamu pada 9 Mac 2006 di antara jam 3 petang hingga 6.20 petang, di No. 02-04, Blok Kekwa, Apartment Dahlia, Jalan 5/2 Bandar Country Homes, Rawang di dalam daerah Gombak, di dalam Negeri Selangor Darul Ehsan, telah melakukan bunuh dengan menyebabkan kematian terhadap Siti Zawiah binti Sudin (KPT: 830412-03-5414) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan."

[8] The 'rape charge' marked as P11 had read: "Bahawa kamu pada 9 Mac 2006 jam 3 petang hingga 6.20 petang di No. 02-04, Blok Kekwa, Apartment Dahlia, Jalan 5/2 bandar Country Homes, Rawang di dalam Daerah Gombak, di dalam Negeri Selangor Darul

Ehsan, telah merogol Siti Zawiah binti Sudin (KPT: 830412-03-5414) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 376 Kanun Keseksaan."

The Constituent Elements Of Offences Under ss. 300 And 376 Of The Penal Code

[9] 'Murder', simply stated, is an act of causing another person's death with illegal intent. The essential legal ingredient that requires to be proved, in order o prove murder under s. 300 of the Penal Code, may be stated as follows, namely that the *actus reus* was done by the accused person: (i) with the intention of causing death; (ii) with the intention of causing such bodily injury as the offender knows to be likely to cause death to the person to whom the harm is caused; (iii) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; (iv) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death. In the case of *Krishnan Marimuthu & Anor v. PP* [1982] CLJ 186; [1982] CLJ (Rep) 152 it was held by the then Supreme Court that it was not a legal obligation for the prosecution to state specifically, in a charge for murder, as to which particular clause in the definition under s. 300 of the Penal Code, the accused person was alleged to have committed the offence as charged. Based on that high authority, the charge such as appeared in P2 would suffice, to my mind, to bring home to accused, the alleged complaint by the public prosecutor on behalf of the State, against him. The requisite evidence would be unfolded during the course of the trial.

[10] 'Rape' connotes a sexual intercourse between a man and a woman of age of discretion (not being legally 'underaged' or incapable of giving consent) without her prior consent. Under the law as contained under s. 376 of the Penal Code, for the offence of rape, the prosecution is required to prove that the penetration for the accused's penis into the private part of the victim was done without her consent. In the context of this case, the deceased was about 23 years old at the time of the incident and as such, consent was a relevant issue and the burden was on the prosecution to prove that the deceased had not consented to the sexual intercourse with the accused.

[11] In order to secure a conviction, the prosecution must discharge the burden placed on its shoulders on the threshold of proof which is beyond reasonable doubt. Before that is achievable, it would have to establish a *prima facie* case with respect to the two charges, through evidence, either direct or in the form of circumstantial evidence, in order for this court to call the accused to enter on his defence to each of the charges preferred against him. Anything that fell short of such proof by the prosecution must entail orders of acquittal and discharge in favour of the accused, from both the said charges.

The Prosecution's Case

[12] After the learned deputy had closed the case for the prosecution, it had become clear that the case against the accused had not been one based on direct evidence, in the sense that there was no eyewitness who had seen him commit those offences. Neither was there introduced by the prosecution as evidence, a confession voluntarily given by the accused, wherein the latter had owned up to having committed these offences. So basically, the case for the prosecution had been constructed from the various circumstantial evidence gathered from the relevant witnesses concerned with this case.

[13] The learned deputy had called 19 witnesses to testify before this court to prove the two charges against the accused, and though each of these witnesses had its own important role to play in the course of proving the two charges, it cannot be denied that the evidence of SP3, SP4, SP5, SP6, SP7, SP8, SP9, SP11, SP14, SP17, SP18 and SP19 must be viewed as key in the overall scheme of the whole prosecution's case. I must hasten to add that this observation is not tantamount to saying that the evidence of the other witnesses are not critical, but rather in comparative terms, the evidence of those witnesses as singled out above would be, what could be termed as being more impactful and therefore, ought to deserve particular mention in the course of this judgment, in so far as it is specifically necessary to refer to and to quote from their evidence verbatim.

[14] The evidence of SP3 and SP4 had established as undisputed fact that the deceased had indeed been staying with them for about a week until the day of the incident. The evidence of SP4

specifically also established as a fact that the deceased had, on that fateful day, a set of keys to the apartment, where she said; "Setiba saya di luar pintu rumah saya di no. 02-04 itu saya nampak pintu2 rumah saya itu dalam keadaan berkunci. Saya dapati mangga Solex berkunci di grille pintu. Pintu grille itu pun berkunci dan pintu kayu pun berkunci. Saya cuba buka pintu2 itu dengan goncang mereka tetapi tidak dapat. Saya tidak ada kunci pada masa itu kerana kunci2 pada rumah saya, yang ada 4 anak kunci itu telah saya serah kepada Siti Zawiah pada pagi hari itu sebelum saya pergi kerja. Kami telah berjanji untuk berjumpa di pekan Rawang supaya dia kuncikan rumah selepas keluar dari rumah itu." That was the reason why SP4 accepted the invitation of her neighbour to wait for Nur Hanani (SP3) in the former's apartment after she had failed to get into her apartment that night.

[15] When suggested during crossed-examination by the learned counsel, that other persons too had a set of keys to her apartment besides she and Nur Hanani, SP4 had disagreed, when she said: "Saya tidak setuju. Tidak ada orang lain yang punya set kunci kepada rumah saya selain saya dan Nur Hanani (SP3)". This fact was also adverted to by SP3 when she said in her testimony, thus: "Setahu saya, Siti Zawiah ada pegang set kunci pada rumah itu yang Zalina pegang." It was also the evidence of SP3 that the deceased had never told her anything about she having a boyfriend and that as far as she could recall, the deceased never invited any man into her apartment during her stay with them. This factual assertion was not challenged by the defence.

[16] The evidence by the arresting Police Officer, Chief Inspector Nordin Misban (SP6) had shown that, among the items that he had seized from the accused when the latter was arrested in Perak a few days after the accident, actually it was on 16 March to be exact, had been a set of house keys, which were subsequently identified by SP6 in court and marked as P13(1-4). His evidence on this has been as follows: "Semasa tangkapan tersebut, saya telah merampas empat anak kunci dari poket kanan seluar Muhammad Rasid". In answer to cross-examination by leaned counsel, SP6 had said that: "Saya telah rampas empat anak kunci daripada OKT seperti dalam P13(1-4) yang terpompong dalam P13(5)." The P13(5) has been the ring that held the four keys together into a bunch.

[17] SP4 had also identified all the four keys individually and of each, its particular use. According to her, P13(1) was the key to the front grille door; P13(2) was the key to the mangga (padlock) used on the said grille; P13(3) was the key to the front wooden door and P13(4) was the key to the door to her room in the apartment. She had also identified the ring that had held the four keys together (P13(5)). Her positive identification on the said four keys and the ring used to keep them in a bunch showed that the said keys were her set of keys. How could that set of keys of hers be in the possession of the accused when SP4 had given them to the deceased, not to him? The circumstances surrounding the positive identification of all the four keys (P13(1-4)) and P13(5) by SP4 led this court to infer that the accused must have taken the said keys from the possession of the deceased and that he must be the person who had locked up the doors to the apartment before SP4 had arrived at the same apartment on the fateful night. In the context of evidence as laid out in this case by the prosecution witnesses, it would have been impossible for the deceased to have locked all the doors because, no keys were found in the room where she was found lying on the floor writhing and groaning in pain by her friends namely, SP3 and SP4, in the early morning of 10 March 2006. On the contrary, it was the uncontroverted evidence of SP6, the arresting officer, that he had seized the bunch of keys (P13(1-4)) together with a ring (P13(5)) that held them together, from the accused, and which were identified by SP4 in this court positively and without much difficulty.

[18] It was also in the evidence of SP6, the said arresting officer that the accused had tried to escape arrest by the police. He had said in his testimony, as follows: "Semasa saya buat serbuan, OKT saya lihat sedang cuba melarikan diri ke arah bahagian belakang rumah tersebut, tetapi anggota saya telah buat persiapan dengan mengepung pintu bahagian belakang rumah itu, iaitu di bahagian luar pintu belakang rumah itu. Saya telah sediakan dua orang anggota untuk buat kepungan di situ." Under cross-examination by learned counsel, SP6 had stood his ground on this issue. I had no reason to doubt SP6's evidence. Although the evidence of conduct as envisaged under s. 8 of the Evidence Act 1950 may be relevant as proof of the guilty state of mind of an accused person, taken alone it may not be unequivocal evidence thereof. But if it is taken together with other available evidence before the

court, its probative value will invariably be greatly enhanced towards establishing the same. In this case, add to it the fact of the accused attempt to take flight, the fact that the accused had also been found, in his trousers pocket upon arrest, the bunch of house-keys belonging to SP4 which SP4 had left with the deceased, had further bolstered the inference that he was concerned with the incident involving the deceased a few days prior.

[19] There was also the evidence of Encik Sukri Palutturi (SP11) who had told this court that at the material time, he was staying at the same apartment, Blok Kekwa and that on 9 March 2006, he was off-duty as a security guard. He said that at about 2.30pm on that day, he was making his way down the staircase from his apartment unit, when he had to pass by the accused whom he saw standing on the stairs near the second floor. At that instance too, he also said that he also saw a lady clad in red T-shirt and wearing sarong batek standing in front of the door of apartment unit no. 02-04, namely the SP4's apartment unit where the deceased was staying with SP3 and SP4. SP11 said that he was quite familiar with the accused by sight. He also identified the accused as the brother of 'Maknya Hakim', referring to the fact that the accused was the brother of the mother of a boy by the name of Hakim. According to him, the accused even greeted him that day. At the subsequent ID parade, SP11 had positively identified the accused without much difficulty. He had also identified the lady clothing which he said were worn by the lady whom he said he saw in front of the door of unit no 02-04 of his apartment. He said that he could recall the lady had smiled at him when he went pass her on that day. As regards his identification of the accused, he said that although he did know him by name, he was familiar with him, being in the same neighbourhood and he knows that the accused stayed with his sister in the same apartment Block Kekwa. Actually according to his evidence, the accused did in fact greet him as he was passing by him at the staircase at the second floor as follows: "Pakcik hendak ke mana? and to which SP11 had replied that he had wanted to go to Rawang town to buy a memory card. This piece of evidence was not challenged by the defence. According to him too, when he had returned from Rawang at about 5pm that day, he did not see the accused and the lady in red T-shirt at the same place at level 2 at Blok Kekwa anymore. The value of this piece of evidence, if

A accepted by this court, would lie in the fact that it showed that there was opportunity and would point to the probability that indeed the accused was in close proximity with the deceased before the approximate time of these offences.

B **[20]** The two key witnesses, SP3 and SP4 had also identified several items that were found and recovered by the police CSI Forensic team at the scene of the crime, and SP4 in particular had identified the electric iron (P10B) in this court as belonging to her. She had also noticed that the handle to the said P10B had now
C been fractured/broken and that the white cord attached to it had dark spots on it. The evidence of Chief Inspector Collin Babat (SP7), the lead CSI officer, had shown to this court that among the items that he had seized from the scene of crime in the said room had been an electric iron which he also identified in court
D as the one that had been marked as P10B.

[21] The SP4 also gave evidence on the phone calls she said she had made to the deceased at about 6pm on 9 March 2006 which went unanswered and the replies to her SMSes to which the
E replies had come such as "on the way", "jalan jam" and "hari hujan". In fact, after sometime, when SP4 called the deceased's handphone number there was no sound forthcoming from the deceased's handphone's end. Among the items seized from the accused by the arresting officer (SP6) had been a Nokia
F handphone model 3310. When SP4 was shown, during the course of this trial by the learned deputy, the said handphone and when SP4 was asked if she could identify the same, SP4 could say that she knew that the deceased had a Nokia handphone but that she could not recall the specific Nokia model. Her evidence on the
G handphone has been that when she first entered her room after it was opened by "Boy" that fateful night "… saya tidak nampak lagi talipon kepunyaan Siti Zawiah." She went on to say, "Saya ingat jenama talipon bimbitnya adalah 'Nokia', tapi saya tidak ingat modelnya. Saya tidak pasti modelnya." And the evidence of SP11,
H the security guard, had been that by the time he came back to his apartment block at about 5pm on that day, he did not see the accused and the lady in red T-shirt at the front of the door to apartment unit no. 02-04 Blok Kekwa anymore. From these, it could reasonably be inferred that when SP4 called the deceased
I at about 6pm on that fateful day, the accused had already got

possession of the deceased's handphone. Of course, he could not answer those calls as he did not know SP4. But he could force the deceased to reply to the SMSes that were sent to the deceased by SP4. It is my finding that it was the accused who did in fact instructed the deceased to reply to those SMSes if those answers as said by SP4 were indeed true. I noted that there was no cross-examination on this crucial part of the SP4's evidence. As such, it must be accepted as true. I had no reason to doubt her evidence on the answers to her SMSes to the deceased on that day. Looking at the circumstances, there was no way that the deceased could, in all probability, be on her way to Rawang town nor for her to say that the road was jammed. It is my finding that all the replies to SP4's SMSes were lies concocted by the accused.

[22] A lie can be corroborative of an accused person's guilty state of mind as can be seen in the case of *Syed Ali Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340, where Justice Salleh Abas FCJ (as he then was) at p. 135, had said as follows: "We recall that the accused told PW4 that the purpose of borrowing the car was to go to Terengganu. This was a deliberate lie as he never intended to go to Terengganu at all but to Singapore, which he did. We also recall that he told PW4 that he needed the car for two days. And as such there was no reason at all for him to see PW4 again in the evening of 15 August for permission to use it further on 15 August. Such permission was already given to him. In other jurisdictions, a false statement made by an accused person concerning the surrounding circumstances in which an offence was committed whilst he had an opportunity to commit the offence can be regarded as corroboration of the evidence against him: *Eade v. The King* [1924] 34 CLR 154 and also *Regina v. Lucas (Ruth)* [1981] 3 WLR 120. We accept the decisions in these cases to be good law. In this case we hold that the representation he made to PW4 regarding the purpose of borrowing the car was a deliberate lie and is therefore a corroborative evidence against him for which he must explain. Such lie is a reflection of his consciousness of guilt as regards the use he intended to make of the car in question." Reverting back to this case before me, the only reasonable inference must be that it was the accused who had caused those replies to SP4's SMSes, as red herrings, to falsely assuage SP4's concerns about the deceased's whereabouts at that time. So,

these had been lies, deliberately perpetrated by the accused and were corroborative of his guilty mind in the commission of the offences as per the charges preferred against him.

[23] As could be recalled, Siti Zawiah was sent to the Selayang Hospital and that she had died shortly after arrival there. An autopsy was performed on her body by the pathologist, Dr Mohd Shah bin Mahmood (SP5). According to his evidence before this court, the deceased had suffered multiple injuries. One such injury had been the one he saw and examined at the forehead of the deceased. The photographs marked as P6(E) and P6(H) would show the said injury. This injury according to SP5 had most likely caused the death of the deceased as it had affected the membrane underneath the brain. The injury was caused by a hard blunt object with a flat surface and a sharp edge and he concluded it could have been caused by a hard hit by using an object such as an electric iron, and he had opined that P10B (the electric iron) could have caused such injury suffered by the deceased on the forehead. Now, looking at the analysis of the specimen marked as 'E6B' (swab of sweat) taken from the broken handle of the P10B by SP7 (the CSI lead officer), the chemist (SP8) had found that the mixed DNA profile developed therefrom had been contributed by the accused and the deceased. So, the inevitable, yet reasonable, inference to be derived from this circumstance must be that both the accused and the deceased must have grappled on the electric iron by its handle (P10B) and the deceased must have tried to resist the accused's attempt to use it to hit her, but to no avail. The accused had therefore successfully inflicted on the deceased, the fatal injury to the forehead. Based on the evaluation of these evidence, I had so found such to be the factual circumstance pertaining to the P10B and the fatal injury on the deceased's forehead.

[24] The SP5 also was of the considered view that the death could have been caused by the break of the hyoid bone inside the neck area and this could have been caused by strong force having been applied there such as strangulation of the neck. The photographs marked as P6(AI) and P6(AJ) would show the said hyoid bone that had broken at the place which appeared to look darker. SP5 also said that he had taken swabs from various parts of the body of the deceased for DNA analysis by the government chemist and among others, he had taken swabs from the chest and

the neck region of the deceased's body. Altogether, SP5 had taken nine swabs from various places of the deceased's body and they were later on individually put into test tubes and marked for identification. The test tubes were later placed into an envelope provided by SP5 and sealed with Hospital Selayang official seal. The sealed envelope was handed to the police and it was then marked as 'E15' before it was sent to the Chemistry Department. SP8 the chemist, as it had appeared from his evidence, had proceeded to mark each of the swabs in each test tubes therein contained in the envelope marked 'E15', as 'E15(a)' - 'E15(i)' respectively. From the results of his DNA profiling analysis on all the said specimens, SP8 had found that specimen marked 'E15(c), namely swab taken from the chest of the deceased had been a mixed DNA profile contributed by both the accused and the deceased. The SP5 had described most of the wounds sustained by the deceased as defensive wounds and there was no suggestion emanating from the defence that the deceased had strangled herself and broke her hyoid bone in the process. Based on the circumstances surrounding this incident, the only reasonable inference that could be arrive at with regard to the breaking of the hyoid bone of the deceased must necessarily be that it was caused by the accused in the struggle between him and the deceased and in his quest to force her into submission he must have strangled her. It is my finding that the said struggle, in all probability, had resulted in his sweat falling on the chest of the deceased causing it to mix with the deceased sweat, thus accounting for the mixed profile developed as per the analysis of E15(c) by SP8. No other male DNA profile was profiled from the specimens marked E15(c) except that belonging to the accused. In the context of the aftermath as could be seen from the photographs and the evidence of the lead CSI team (SP7), no other reasonable inference could, in all fairness, be arrived at. As such, it is my finding that both the fatal head injury and the fatal break of the hyoid bone were caused intentionally to cause the death of the deceased, by the accused.

[25] When examined by the learned and deputy on the cause of death of the deceased, SP5 in his own clear words had said: "Sebab kematian adalah kecederaan di bahagian kepala dan cekekan dengan tangan dileher. Kecederaan dibahagian kepala telah menyebabkan pendarahan di bawah selaput otak dan juga pendarahan dalam tisu otak si mati. Kesan cekekan berdasarkan

A kepada tulang 'hyoid' leher si mati yang telah patah. Pada pendapat saya, kecederaan seperti yang saya katakan pada kepala dan patah tulang 'hyoid' itu pada lazimnya boleh menyebabkan kematian dan dalam kes ini kematian si mati." He further explained as follows: "Maksud saya sama ada kedua-duanya atau salah satu B daripadanya, boleh menyebabkan kematian si mati dan saya tidak dapat menentukan dengan tepat yang mana satu telah terlebih dahulu menyebabkan kematian si mati." (emphasis added) So, it is clear that both or either of the two injuries could have caused the death of the deceased and the only thing which the SP5 could C not say with certainty has been which of these two injuries had caused her death **earlier in point of time**. To my mind, the **relative** time as to which of the two fatal injuries had **earlier** between them caused the death of the deceased was not **relevant**, but what was relevant has been that it had been established D (which had not been challenged by the defence) **both or either** of the head injury or strangulation (causing the hyoid bone to break) had caused the death of the deceased in this case. From the manner in which the deceased was found inside the locked room, with all the injuries sustained by her at the crucial part of E her anatomy, the intent was that she was left for dead by her assailant, namely the accused.

[26] SP5 had also noted that from the pattern which he had observed of the injuries (there were 18 external injuries and four F internal injuries in total), none of them had been self-inflicted and that he had also noted that the injuries sustained by the deceased had been so suffered, as if she was acting in self defence and while thwarting frontal assaults on her. These wounds are otherwise commonly referred to as defensive wounds. Photograph G marked as P6(Y) would show the defensive wounds. Though no knife was recovered from the scene of the crime by the police CSI team, nevertheless a bloodied knife sheath (P32A) was indeed recovered therefrom by SP7 and the chemist's analysis on the swab taken from the said sheath, had yielded a finding confirming H that it was a mixed DNA profile contributed only by both the accused and the deceased. When SP5 was asked by the learned deputy on the injuries appearing in photograph P6(Y), this is what SP5 had said: "Saya berpendapat ianya selaras dengan kecederaan tangkisan, bermaksud simati sedar ia diserang dan cuba I mempertahankan diri semasa diserang." Looking at the injuries at

the arm of the deceased in P6(Y), one does not need to be enlightened by an expert as to how they had been caused. Those injuries could speak, and indeed, had spoken for themselves.

[27] Apart from these injuries on the deceased, SP5 also noted the presence of white coloured liquid in the private part of the deceased which he had testified to be either the deceased's own seminal fluid ('cecair kelamin semulajadi si mati') or a male's sperm. According to him, its identity could only be determined by way of DNA profiling. As such, he told this court that he had taken sample specimen of the same, exactly for the purpose so that it could be analysed for certainty by the government chemist. As could be recalled, SP8 had found a partial DNA profile on one of the swabs retrieved from the body of the deceased, marked as 'E15(e)' which he had found to be consistent which having come from the same source as blood specimen marked 'E24' (Muhammad Rasid's) namely the Accused in this case. A scrutiny on 'E15(e)' (P22J) had revealed that the specimen on that swabstick had been obtained by SP5, the pathologist, from the outer vulva (private part) of the deceased. Lest one forgets, the DNA profiled developed from blood specimen marked 'E24' was contributed by the accused and which had matched with the DNA profile developed from the specimen from the swab marked 'E15(e)' by the SP8. Apart from that, the SP8 had also found a mixed profile from analysis of specimen marked as 'E15(g)' (P22L) which was retrieved by SP5 from the private part of the deceased described as 'high vagina'. The reasonable inference that could be derived from these circumstances must be that the accused had penetrated the private part of the deceased and had ejaculated his sperm inside her. With regard to the strangulation that had caused the breaking of the hyoid bone of the deceased, SP5 had said: "Patahnya tulang hyoid ini agak flexible. Cekekan tidak semestinya meninggalkan bekas cekekan di kulit leher. Tetapi dalam kes ini, gambar P6(X) menunjukkan satu kecederaan cakaran di tempat no.10 dalam gambar itu, di mana kemungkinan si mati cuba melepaskan genggaman cekekan di lehernya oleh penyerangnya." From the kind of injuries sustained by the deceased as described by SP5 and as could be seen from the various photographs as alluded by me, as well as the presence of signs of a struggle having taken place in the room, the only reasonable inference that could be deduced therefrom must be a *prima facie* indication of the non-consensual sexual intercourse between the accused and the deceased.

[28] Then of course there had been the evidence of the Government Chemist (SP8). His evidence is entirely independent in the sense that he was not an eyewitness neither did he go to the scene of the alleged crime. He just received the various exhibits sent by the police of analysis. He had made findings on DNA profiling developed from blood specimens, namely 'E24' (accused), 'E16' (deceased) and 'E25' (Roslan). Throughout his evidence in this court, he had found matching DNA profiles from the mixed profile as being attributable to the accused and deceased as the male and the female contributor on, among others, raffia string ('E5') and electric iron (P10B) and swab from sheath marked 'E4'. Similar mixed DNA profiles findings were also made on the handle of the electric iron, sweat swabs retrieved by SP5 from the deceased's chest and high vagina. But, on the other hand, the SP8 had found that there was no matching profile developed for Roslan's DNA profile with any of the DNA profiles developed from the many specimens retrieved from the deceased's body nor from the numerous items or exhibits at the crime scene. It would be useful to reproduce verbatim to some extent, SP8's findings as adduced in this court. Instead, all the mixed DNA profiles developed from the various specimens were attributable to only one male contributor and one female contributor, namely the accused ('E24') and the deceased ('E16'), respectively. This is what the Chemist SP8 had found in the course of his DNA profiling and analysis of the various specimens sent to him for analysis and matching of the developed profiles found on the items from which the said specimens had been sourced: "On comparison, I found the findings as follows:

(1) The DNA profile developed from the blood stains on sarong marked 'E11' and brassiere marked 'E14' and the seminal stains from mat marked 'E1', seminal stains from sarong marked 'E11', and seminal stains from panties marked 'E13' to match with each other, and with that developed from blood specimen marked 'E24' which was labelled 'Muhammad Rasid', thus indicating the DNA identified originated from the same source.

The probability of a randomly selected unrelated individual having a matching DNA profile is 1 in 110 quintillion, as calculated based on the Malaysian Malay Population Database kept in my department.

I also found that the partial DNA profile, developed from E15(e) (one of the plastic tubes containing swab-stick) to be consistent which having come from the same source as blood specimen marked 'E24' (Muhammad Rasid's).

Secondly, the DNA profiles developed from hairs in envelopes marked 'E2A' and 'E8', blood stains on mat 'E1', towels 'E2' and 'E3', swabs 'E6'(A), pillow and pillow case 'E9', and T-shirt 'E12' to match with each other and with that developed from blood specimen marked 'E16', which was labelled 'Siti Zawiah bte Sudin', thus indicating that the DNA identified originated from the same source. The probability of a randomly selected unrelated individual having a matching DNA profile is 1 in 760 quintillion, as calculated based on the Malaysia Malay population database kept in my department.

Thirdly, the DNA profile developed from the non-sperm cell fraction of the seminal stains on mat marked 'E1', sarong 'E11', and panties 'E13' to be mixed DNA profile originating from at least one female and one male source. The sources represented by blood stain specimen marked 'E16' and labelled 'Siti Zawiah bte Sudin' and blood specimen marked 'E24' which was labelled 'Muhammad Rasid' were consistent with being the female and male contributors to the said mixed DNA profile.

Fourthly, the DNA profile developed from the blood stains on sarong marked 'E10', raffia string marked 'E5', swab from sheath marked 'E4', swabs marked 'E6B', E15(c) and E15(g) to be mixed DNA profile to have originated from at least one female and one male source. The sources represented by blood stains specimen marked 'E16' and blood specimen marked 'E24' were consistent with being the female and male contributor respectively, through the mixed profile.

Further, I found that partial DNA profile developed from the blood stains on electric iron marked 'E6' to be mixed profile consistently with having come from the sources represented from the blood specimens marked 'E16' and blood specimen marked 'E24'.

A Fifthly, no foreign DNA profiles were developed from swabs marked E15(a), (b), (d), (f), (h) and (i); as well as from nail clipping marked 'E20' and 'E21' which only gave a female DNA profile concordant with blood specimen 'E16' - 'Siti Zawiah bte Sudin'.

B When there is a match obtained, it indicates almost 100% certainty, though in science, theoretically there cannot be a 100% certainty. Further, the match probability obtained in respect of both the identified male and female DNA profile to be a rare C profile, consistent with my conclusion that each could only have originated from those identified individuals, unless of course if there is an identical twin, because identical twins have the same and exact DNA profile."

D **[29]** Suffice it is for this court to say that findings by SP8 can only be said to be definitive as to the DNA profile match-ups and they had pointed to the presence only of the DNA profiles attributable to sources identified as the deceased and the accused. I have no reason to doubt the accuracy of his findings, nor the E propriety of the methodology, namely the Polymerase Chain Reaction ('PCR') technique, which he had employed to develop those DNA profiles from the various identified specimens he had received from the police for analysis. He had testified before me that his area of specialization at the government Chemistry F Department, Petaling Jaya, had been DNA profiling analysis and that he had done thousands of such analysis throughout his career as a government chemist. He had explained too that 'DNA' stood for Deoxyribonucleic Acid, a hereditary component found in cells in a human body and that each individual person has a unique G DNA profile unless he or she has an identical twin or triplet as sibling(s). Neither did I notice any particularly sustained objections coming from learned counsel on the methodology undertaken by SP8. Based on SP8's qualifications and vast and long experience in this specialized branch of scientific study, I had no difficulty in H treating him as an expert witness on DNA profiling and its related areas. I had also therefore no difficulty in accepting his independent testimony as adduced before this court by him as credible. In essence, his evidence had to as very far extent, established the very crucial factum, namely that the accused was I present at the scene of these crimes, which includes the body of the deceased as this case involved an alleged offence of rape of

the deceased. There have been authorities saying that in a case of rape, the scene of the crime includes the very corpus of the victim. Looking at the probability that the DNA profiles of the accused might be the same as that of another Malay male, namely at 1 in 110 quintillion, such probability can only be surmised as very remote, if not totally impossible. It must be noted that it was never suggested to the investigating officer (SP17) neither to SP8 that the accused had a twin brother. As such, the presence of the accused at the scene of crime had been satisfactorily established through the presence of his genetic fingerprints on the critical items found at the scene, although from the evidence adduced, apart from the evidence of SP11, who said he saw the accused and the deceased at about 2.30pm on that day, nobody had seen both of them inside SP4's room when these offences were committed.

[30] The learned counsel had contended that from the reading of the testimony of Lance Corporal Malik Basiron (SP18), there was no mention of Roslan having been sent to hospital together with the accused to get his blood specimen for DNA profiling. In all fairness, this contention must need be given its due attention and focus by me. First, one must look at the evidence of the ASP Mohd Ridzuan, investigating officer (SP17) which had shown that he had ordered that Roslan be sent together with the accused for that purpose. In this regard, SP17 had said: "Nama Roslan telah di ditimbulkan oleh OKT, saya setuju. Saya telah siasat lokasi dia bekerja semasa kejadian, pengakuan dia dan ujian DNA darah daripadanya. Saya ingat ada arahkan dia pergi buat pemeriksaan oleh doctor, **bersama-sama OKT**, di Hospital Selayang, tapi saya tidak ingat nama doctor. Dia dieskot oleh anggota polis ke Hospital Selayang bagi tujuan itu." (emphasis added). The doctor was SP14, Dr Farina bte Mohd Salleh who, in this regard had said: "Saya **tidak ingat** ada atau tidak orang lain dibawa oleh Abdul Malik selain Muhammad Rasid berjumpa dengan saya." (emphasis added). According to SP17, he had sent the accused to Selayang Hospital on 20 March 2006 for that purpose and had on the same day, received three bottles of blood specimens belonging to the accused, Roslan bin Hassan and Fairusa Sani. This evidence was supported by the evidence of the Chemist SP8 who had received, among the many exhibits from the police for his analysis, a test tube marked 'E25'. He said: "On 5 April 2006 at 2.30pm, I received from Norazeelah (his colleague), three test

A tubes marked 'E24', 'E25' and 'E26' all sealed "Hospital Selayang". Later, in his conclusions on his findings, SP8 had said that the DNA profile that he had developed from 'E25' had come from the specimen in test tube marked 'E25' bearing the name of Roslan. It is to be recalled that Lance Corporal Abdul Malik
B Basiron (SP18) had escorted the accused on 20 March 2006 to Hospital Selayang. He had received the tube containing blood specimen which he identified in this court bearing the name 'Muhammad Rasid' from the hospital and handed it to the investigating officer and was later marked as 'E24'. According to
C the investigating officer (SP17) he had instructed Sarjan Mustapha Amran bin Abdullah (SP19) to send to the Chemist Department, exhibits consisting of blood specimens for DNA analysis and profiling and matching, as enumerated in form Pol. 31 which had been marked as P41 in this court. In his own words, SP17 had
D said: "Sample darah OKT **adalah salah satu daripada sample yang dihantar**." The said request form Pol. 31 (P41) was concerned with three test tubes and the three test tubes sought to be analysed by the Chemist were "E24 - Tiub mengandungi darah suspek, Muhammad Rasid bin Hashim, Kpt: 801001-05-
E 5207. E25 - Tiub mengandungi darah suspek, **Roslan bin Hassan**, Kpt: 871007-14-5645. E26 - Tiub mengandungi darah suspek, Fairusani bin Munir, Kpt: 770124-14-5131" (emphasis added). In fact, the evidence of Sgt Mustapha Amran (SP19) himself had clarified that matter beyond any doubt when he
F testified that he had labelled the various plastic tubes that contained the blood specimens on instructions of SP17 before the same were sent to the Chemistry Department at Petaling Jaya. He had said among others, that he had labelled the plastic tube containing the accused's blood specimen as "E24". He had
G **labelled the blood specimen of Roslan as "E25"** and that of Fairusani as "E26". With regard to the accused's and Roslan's blood samples, this is what he had said: "Saya camkan satu tiub yang saya tandakan sebagai "E24" yang mengandungi darah specimen suspek/OKT Muhammad Rasid. **Saya camkan satu tiub**
H **darah suspek bernama Roslan. Tiub itu saya tanda sebagai "E25". Saya cam**." (emphasis added)

[31] As such, under the circumstances, in all probabilities and without any reasonable doubt, Roslan did get his blood specimen
I at the Selayang Hospital and the fact that SP14 'tidak ingat' does not mean that she did not take the blood specimen from Roslan. There was no outright negation from SP14 on that fact. On the

contrary, there were other evidence to show that Roslan's blood was taken for DNA analysis and was indeed analysed by SP8. Those evidence had been spelt out as above by me. As such, the test tube marked as 'E25' must have been the specimen of Roslan. It was sealed with the seal of Hospital Selayang by the said Hospital and marked as "E25" by SP19 before it was handed over by him to the Chemistry Department where SP8 had proceeded to analyse its content for DNA profiling. So, to my mind, from the evidence above, there is truth in the assertion by the investigating officer (SP17) that Roslan was sent to hospital for the purpose of getting his blood specimen for DNA profiling and that indeed such blood specimen was taken from him by the said hospital. It was then duly marked as "E25" and sent to the Chemistry Department by SP19 on the instruction of SP17 and was analysed for profiling and matching by SP8. In the light of the said evidence, it would be too illogical and far-fetched not to so conclude. I had no doubt about Roslan's blood specimen as contained in the test tube marked as "E25". The SP18 said in his evidence that besides sending the accused to the Selayang Hospital as instructed by SP17, the investigating officer, he also sent other suspects and he did not mention any names of those suspects. But what is equally clear too, from his evidence has been that he never said that he did not bring Roslan to the Selayang Hospital. It must also be noted that when SP19 Sarjan Mustapha Amran testified to the fact that he had marked the tube containing Roslan's blood specimen, he was never challenged on that fact by the learned counsel that it was indeed Roslan's blood specimen. The law on the effect of failure to cross-examine or challenge as asserted fact by a witness that is deemed material is clear and needed no elaborate amplification. Suffice for me to cite the locus classicus on this important part of legal litigation. And the case that would come to mind, quite immediately, must be *AEG Carapiet v. AY Derderian* AIR [1961] Cal 359, where the speech by Justice Mukerji J could only be described as nothing less than illuminating, where he had cited the House of Lords decision in *Browne v. Dunn* [1983] 6 The Reports 67. Indeed, Justice Sharma J had referred to this case with approval in the case of *Chua Beow Huat v. PP* [1968] 1 LNS 24 and learned Justice Tun Zaki had reiterated that principle as recently as in the case of *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236 [Rayuan Jenayah No. 05-21-2007(P) & 05-22-2007(P)].

A B C D E F G H I

A **Court's Ruling At End Of Prosecution's Case**

[32] From the above inferences, it is my finding that the ingredients of s. 300 of the Penal Code had been established by the prosecution in this case. The intention to kill could be amply
B inferred from the physical evidence which were recovered from the scene in the form of the bloodied electric iron (P10B) and the raffia string which was also bloodied marked 'E5', swab from knife sheath marked 'E4', all of which had been confirmed to be a mixed DNA profile originating from at least 1 female and one male
C source. The sources represented by blood stains specimen marked 'E16' (Siti Zawiah bte Sudin) and blood specimen marked 'E24' (Muhammad Rasid) were consistent with being the female and male contributor respectively, through the mixed profile. All these bloodied items could only be indicative of violence having taken
D place at the scene of the crime.

[33] The serious injuries sustained by the deceased were classified as defensive wounds by the pathologist (SP5) evidencing grave assault having been perpetrated on her. The fact that her head
E injury was found to be consistent with an injury that could be caused by the P10B (the electric iron) had connected the offence to the accused as the DNA profile developed from the blood specimen retrieved from P10B had revealed to be a mixed DNA profile originating from the accused and the deceased. The nature
F of the injury on the head of the deceased and the fact that it was caused to the head, which was a critical part of the human anatomy, must necessarily be interpreted that such injury had been caused with an intention to cause the death of the deceased. The blow by the electric iron was so hard that its handle broke.
G Similarly, according to SP5, the injury to the neck region that had caused the hyoid bone to break had also caused the death of the deceased. As was shown by the evidence of SP8, no DNA profiles belonging to anybody else was traceable from the specimens analysed by him except those belonging to the deceased
H and the accused person.

[34] As regards the evidence pertaining to the offence of rape, similarly I had found sufficient evidence tending to prove that charge as well. At this juncture, perhaps it would be appropriate to restate the legal position as regards the proof required of the
I prosecution to prove the commission of the offence of rape by an accused person. For the purpose, to my mind, a reference must

be made to the works of the learned authors entitled, *Modi on Medical Jurisprudence and Toxicology*, 21st edn p. 369, where the learned author has written as follows: "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis by a medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, and not a medical one." And this passage was approved by the Supreme Court of India in the case of *Madan Gopal Kakkad v. Nanal Dubey* [1992] 3 SCC 204. The Supreme Court in another case had also relied on the work by another esteemed writer Parikh, entitled *Parikh's Textbook on medical Jurisprudence and Toxicology*, 5th edn p. 439, where the learned writer had said: "Sexual intercourse - In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of the semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains". Basing on the authoritative work, the Supreme Court in the *Harpal Singh* AIR 1981 SC 361 had proceeded to hold that absence of injuries on the private parts of the prosecutrix would not rule out her being subjected to rape (see, *Ratanial & Dhirajlal's Law of Crimes*, 24th edn, pp. 1798 - 1799). Again, in this case before me, from the evidence of the pathologist (SP5) it could be reasonably concluded that there was sexual intercourse where there was presents in the private part of the deceased the sperm which the chemist (SP8) had confirmed to belong to the accused. These had come in the form of specimens marked as 'E15(e)' (vulva luar') and 'E15(g)' ('high vagina') which had been found to contain the accused's DNA profile and a mixed DNA profile originating from both the accused and the deceased, respectively. Under the circumstances, I found that there was penetration by the accused of his penis into the

deceased's private part and that he had ejaculated therein thus accounting for what can be seen the relevant photograph tendered by the prosecution in this court. The accused had never suggested nor had he put to SP5 as to the manner how his DNA could be found inside the deceased's private part, as could be seen in photograph marked as P6(I) and P6(J), other than that as was suggested by SP5 in his answers to questions by the learned deputy. Although there were no injuries discerned by SP5 at the private parts of the deceased, nevertheless from the presence of and the state of the items recovered from the scene of crime, including the bloodied knife sheath, the only reasonable inference to be derived therefrom would be that there had been forced entry into the deceased's private part by the accused's penis. The lead CSI police officer (SP7) had said that there were signs of struggle in the room from his analysis of the scene of crime and the fact that the pathologist (SP5) had said that the deceased had suffered defensive wounds on parts of her body further fortified that inevitable conclusion by this court. Although Chief Inspector Collin Babat (SP7) had agreed with learned counsel's suggestion that there could be more than two people involved in the struggle, nevertheless, the evidence of the chemist (SP8) had effectively eliminated the evidence of anybody else being present at the scene of crime, apart from the accused and the deceased only. The DNA profiles developed from the specimens retrieved crucial exhibits found at the crime scene in this case were established by SP8 as having been contributed by two sources only namely, the accused and the deceased.

[35] I had subjected these evidence and the credibility of the witnesses called by the prosecution to a maximum evaluation as envisaged by the Court of Appeal decision in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and at the end of such exercise, it is my finding that the prosecution had through its witnesses established a *prima facie* case against the accused on both the charges, as appear in P2 for murder and, in P11 for rape.

[36] Perhaps it would be helpful to put in perspective the true import of the all-important two latin words in our criminal jurisprudence, namely the unassuming duo: "*prima facie*". It is not only important to do that for the purpose of ascertaining whether the prosecution had established such a case that would justify the court to call for the defence in a charge, but from the point of

view of the defence as well, a sound understanding of that term would assist counsel in ascertaining the kind of evidence that may be required to rebut the evidence thus far adduced by the established case by the prosecution. For that purpose then, I would like to quote the words of Justice Buhagiar J in the case *Saminathan & Ors v. PP* [1955] 1 LNS 138 which go as follows: "A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficiently strong evidence, and can be overthrown only by rebutting evidence adduced by the other side". The very same essence was reiterated by learned Justice Augustine Paul FCJ in the case of *Balachandran v. PP* [2005] 1 CLJ 85 where he said when delivering the judgment of the Federal Court thus: "A *prima facie* case is therefore on that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can only be overthrown only by evidence in rebuttal."

[37] On account of the above, this court had therefore ordered the accused to enter on his defence to both the said charges preferred against him in P2 and P11.

The Defence

[38] The accused was informed by this court of the three rights open to him upon him being called to enter on his defence and he had opted to give a statement from the dock. As such, it was not evidence given under oath. In fact, it was a prepared written statement, which was duly tendered in this court as D64.

[39] From his prepared written statement (D64) which he had read from the dock, the accused had said that on the day of the incident, he and his friend by the name of Roslan had approached the deceased whom they had befriended a few day earlier, for the purpose of the accused borrowing some money from her. To be exact, he had wanted to borrow RM20 from her. According to the accused, the deceased had not acceded to his request as she herself had no money. But the accused refused to believe her explanation. According to him, she had instead, in a loud voice asked them to leave her alone. Despite their plea to her to lower her voice she had allegedly persisted in asking them to leave the house in a loud manner. Because of this, the accused said that

without himself realizing it he had covered the deceased's mouth while at the same time he had pushed her into the house so that no one would see he and his friend at the house and so that the deceased could no longer scream. At that juncture, it was his version of the event that the deceased had bitten at his finger and he had reacted by pushing the deceased even harder. At that time too, according to the accused, he had an asthma attack but he could still struggle with the deceased in order to release his finger from the deceased's bite. According to the accused, the deceased shouted even louder and then ran into one of the rooms inside the house. Both the accused and Roslan followed her into the room with a view to calm her down but apparently to no avail. Then at that moment inside the room, to quote the accused's own words in D64, he said: "Pada ketika itu, saya tak tahu dan tak ingat lagi apa yang berlaku." When he finally came to, the accused said that he saw blood on the deceased's head. He also said that he found Roslan standing at the side of the deceased, whom he saw lying motionless on the mattress. Roslan, according to the accused then went out of the room to check whether anybody would come into the house. Meanwhile, according to the accused, he saw the deceased's sarong had been pushed down to her ankles and that she was clad in only her underwear and a T-shirt. Upon seeing that, the accused said that he had proceeded to fondle he breasts and that he had then ejaculated in the direction of the deceased's private part. He also said that he had put his middle finger into the deceased's private part twice. When he saw blood flowing out from the deceased's head he became panic and quickly left the room. On the way out of the room, the accused said that he saw a purse and a handphone which he said he had also taken them away with him. According to him, Roslan was still inside the house when he left the house. The accused then said in D64, that he had then gone back to his sister's house. Inside his sister's house, the accused had packed his bag and when he went back to the deceased's house, he found that the house was locked from inside. Feeling panicked again, the accused said that he was then not concerned about Roslan anymore and he then proceeded to Rawang town where he then took a commuter train ride to KL Sentral. It was also in his statement D64 that after he had arrived at KL Sentral, he had rummaged his trousers' pocket and found the purse and the handphone that he had taken away from the room. At that point of time too, he said he also

discovered a chain of keys in his pocket and which he believed he had inadvertently taken away from the room when he took away the purse and the handphone belonging to the accused. According to the accused when he was arrested by the police in Perak a few days later, the police had seized the said bunch of keys as well from him.

[40] That, according to the accused was what had actually happened in this case. He was charged for having committed the offences of rape and murder of the deceased as per the charges P11 and P2 respectively. Just to recap, on the maximum evaluation of the evidence so far adduced by the prosecution in this case, this court was of the considered opinion that the statutory threshold of a *prima facie* case has been established against the accused person on the charges preferred against him. This court had ruled that the prosecution had established a *prima facie* case against him for both the said charges, which if unrebutted, would warrant his conviction on one or both of the charges.

[41] As such, the onus was then on the accused to rebut the prosecution's case. In a case involving both the charges such as those which this accused was facing before this court, where there was no presumption operating against him, he would need only to raise a reasonable doubt in the prosecution's case in order to secure an acquittal from the charges. In the celebrated case of *Mat v. PP* [1963] 1 LNS 82 Justice Suffian J (as he then was) has clearly outlined the proper approach which a criminal trial judge would have to undertake in the management of his case when appreciating the evidence and before coming to the appropriate decision at the appropriate stage in the course of a criminal proceeding. The 'formula' has since been followed by our trial judges hearing criminal cases from the magistrate's courts right up to the High Courts. Now, having said that, a reasonable doubt is not synonymous with just any fanciful or any whimsical doubt. Rather, it is kind of a doubt as relates to the guilt of the accused person which lingers on in the mind of a reasonable person. Indeed, as was opined by Lord Denning J (as he then was) in the case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, "The law would fail to protect the community if it admitted **fanciful possibilities** to deflect the course of justice." (emphasis added) As to who is the reasonable man has been identified in 1939 in

A the case of *Ghulam Mustafa Gahno v. Emperor* AIR [1939] Sin 182 as follows: "The reasonable man, always an ideal figure, is not a man of identical habits, manners and feelings, wherever he may be. The reasonable man is the normal man of the same class or community as that to which the accused belongs."

B

[42] So, the question that needed to be answered by this court at this stage has been two-fold. One is whether the accused had led evidence in order to rebut the *prima facie* case established by the evidence led by the prosecution, and two, whether such C evidence had created a reasonable doubt on the prosecution's case.

[43] Looking at what now existed before this court, the answer to the first of the two questions must be in the affirmative. It came in the form of D64, the unsworn statement of the accused. D But the answer to the second question, to my mind, could only be ascertained after this court had given due appreciation to D64, as required by the law. I must bear in mind the true nature of D64 as materials properly admitted for consideration by this court. In the case of *Mohamed Salleh v. PP* [1968] 1 LNS 80, the E Federal Court in Singapore had ruled, among others, that although a statement made by the accused person is not a sworn statement, jurors could attach such weight as they think fit and that the jurors should take into account in deciding whether the F prosecution had proven their case. In the case of *Mohd Abbas Danus Baksan v. PP* [2006] 3 CLJ 880, Gopal Sri Ram JCA (as he then was) had said that "We must treat a direction by a judge of himself in the same way as a direction to a jury." So, that has to be the way in which this court ought to regard D64 and then to likewise approach it in the context of the whole case. I then G would subject the resultant product of such appreciation to the test as set out by Justice Suffian J (as he then was) in the case of *Mat v. PP* [1963] 1 LNS 82 and look to see whether the accused had succeeded in raising a reasonable doubt on the prosecution's case.

H

[44] In order to properly appreciate that unsworn statement made by the accused from the dock (D64) it ought not however, to be considered in isolation. Rather, it must be juxtaposed side by side with the evidence led by the prosecution witnesses. In so I doing, the court must also consider the inherent credibility or otherwise of such statement as contained in D64. This court must

also compare it with the credible evidence led by the prosecution especially in the light o the DNA evidence of the Government Chemist, namely Encik Primulapathi Jaya (SP8) who has over 30 years of experience of doing forensic analyses in his laboratory at the government Chemist Department. He is an independent witness and I find no reason whatsoever to doubt the integrity of his evidence which basically had consisted of the objective interpretation of what he had observed in his laboratory when he analysed the numerous exhibits pertaining to this case which were sent to him by the police. I have found SP8 to be a credible witness. In his evidence before me, SP8 had testified, among others, that he had upon due analysis, found the blood stain specimen marked as 'E16' to belong to the victim in this case, namely the deceased Siti Zawiah bte Sudin. He had also found that the blood specimen marked 'E24' to have belonged, upon analysis, to one male contributor namely, Muhammad Rasid bin Hashim, the accused person in this instant case. In this case, the Chemist (SP8) had found that the probability that the DNA profile that had been established to be that of the accused person might belong to another related Malay male, based on the available Malaysian Malay population database kept by the Government Chemist Department was 1 in 110 quintillion. That, to my mind, is one heck of a most remote probability of it ever happening. In common parlance that would be the same as saying that it would be next to being impossibility, unless of course the accused had a twin brother, in fact which was never even suggested by the defence throughout the entire duration of this trial, to exist. In his testimony also, the Chemist (SP8) had found the partial DNA profile developed from the bloodstain developed on the electric iron 'E6' to be a mixed profile consistent with having come from the sources represented bloodstained specimen 'E16' belonging to the deceased and blood specimen marked 'E24' belonging to the accused person. According to the evidence of the Pathologist Dr. Mohd Shah bin Mahmood (SP5) who had performed the post-mortem on the deceased the injury sustained by the deceased on her head, was consistent with injuries that could be caused by an electric iron. SP5 had testified in this court that the electric iron marked as P10(B) would be capable of causing such an injury as sustained by the deceased on her head. According to SP5, that injury had caused bleeding underneath the membrane of the brain as well as bleeding in the brain tissue of the deceased causing

A death to occur. When questioned by the learned DPP, the SP5 had said that such injury sustained by the deceased on her head could have been inflicted by using the said electric iron. Now, we had seen that the said electric iron (P10(B)) had mixed bloodstains (E6) on it, which on analysis by the Chemist (SP8) B had belonged to both the deceased and the accused person in this case. In cross-examination by the learned counsel, SP5 agreed that the P10(B) was an object that could have caused the said injury. The only reasonable inference that this court could draw from such a circumstance such as this is that there must have C been a struggle between the deceased and the accused person when the accused had the P10(B) in his hand and that the accused must have sustained an injury along the way, such that their bloodstains must have become mixed in the process and that the same bloodstains had become stuck to part of P10(B). That D would support the finding made by the SP5 that the said injury sustained by the deceased was not self-inflicted by her. This piece of independent evidence coming from the government Chemist (SP8) has completely debunked the accused version of event when he said that he had nothing to do with the injury sustained by E the deceased on her forehead. If one were to recall, the accused had said in hi D64 that when he came to, he saw blood dripping from the deceased's head. In other words, he had nothing to do with that injury, let alone how it had been caused nor that he had a hand in having caused it. It must also be brought to bear F as well that according to the owner of the P10(B) namely Zalina bte Aziz (SP4) when the P10(B) was shown to her in court, this is what she said: "Sekarang ada kesan pecah padanya. Pada wire putih telah ada kesan warna coklat, dan juga ada tanda-tanda kehitaman (nak, nak hitam) pada wire itu." On record, there has G been no cross-examination on this factual assertion. From that piece of evidence, to my mind, the only reasonable inference that could be drawn namely that the electric iron was perfect and was not in any way broken or that the white wire cord was not discoloured when she last saw it before this incident. This court H had seen that mixed DNA profile attributable to the accused and the deceased had been recovered from that handle to P10(B) and the irresistible inference that ought to be made from that circumstance.

I **[45]** While I am still on the matter of human stains and DNA profiling and findings, from the objective conclusions arrived at by the Chemist (SP8), it is my finding too, that at the time of the

deadly assault perpetrated by this accused on the deceased, the accused was alone. In other words, as no traces of Roslan's DNA was profiled from the human stains retrieved from the person of the deceased or from the specimens retrieved from the various exhibits recovered at the scene of crime, the accused's version in D64 that when he came to, he saw Roslan standing by the deceased who was lying on the mattress on the floor, could not, in all probabilities be sustained. Although D64 did not say expressly that Roslan must have been the person responsible for having caused the head injury suffered by the deceased, nevertheless the insinuations were there and were all too clear to be missed. Looking at D64, apart from it saying that Roslan was at the scene of the crime, this court was not able to see anything contained in it that could rebut the evidence of SP8 and SP5. These witnesses have been independent witnesses and from their objectively and scientifically observed facts, there was nothing to suggest that their resultant findings and observations had been actuated by some oblique motive against the accused in this case. They had just reported to this court what they saw in their laboratory or on the autopsy table. The evidence of the Chemist SP8 had clearly exonerated Roslan, because pursuant to the DNA analysis done by SP8, there was no matching of Roslan's DNA profile developed from his blood sample marked 'E25' with any DNA profiles developed from the numerous samples sent by the police, particularly, those specimens marked as 'E6' which had been established by SP8 as having emanated from the deceased. On the contrary, the Chemist SP8 had found in the course of his DNA profiling and analysis of a pattern of result that had pointed to the presence of **only** the matching of DNA profiles attributable to their respective contributing sources, identified as the accused and the deceased. I had enumerated the findings of SP8 in the course of this judgment *in extenso* when appreciating the evidence led by the prosecution at the end of its case, when touching on the testimony of this particular witness (SP8). I shall therefore not repeat them here, but suffice it is for me to say that, by and large, the accused's D64 had not rebutted SP8's evidence. It was not stated in D64 that the accused had an identical twin. If there was one such identical twin, then in view of SP8's final conclusion, the latter's preceding findings on the matchings of the DNA profiles between the deceased and the accused must indeed be open to much scrutiny, even speculation. In that regard, SP8 had said, and I quote his evidence: "When there is a match

A obtained, it indicates almost 100% certainty, though in science, theoretically there cannot be a 100% certainty. Further the match probability obtained in respect of both the identified male and female DNA profile to be a rare profile, consistent with my conclusion that each could only have originated from those
B identified individuals, unless of course if there is an **identical twin**, because identical twins have the same and exact DNA profile." (emphasis added). But as I had said, there was no such assertion in D64 that the accused had an identical twin sibling and as such, the matter on the findings on the various match-ups
C of the DNA profiles of the accused and the deceased by SP8 therefore, in all fairness, ought to end there and be viewed as conclusive on the matter. Neither was it suggested to SP8 during his cross-examination by learned counsel that Roslan's DNA profile was present on any of the incriminating exhibits via the analysis
D by SP8 of them especially on P10B (the electric iron) and the bloodied raffia string. If it is to be recalled, the SP8 had said that DNA profiling done by him on specimens retrieved from these two exhibits had yielded mixed DNA profiles contributed specifically by the accused and the deceased only, which to my mind, effectively
E means that there was definitely no other person was concerned with them.

[46] In the case of *Munusamy v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC learned Justice Mohd Azmi SCJ had said that
F unless the evidence of the chemist was inherently incredible or the defence called evidence in rebuttal by another expert to contradict the opinion, the court was entitled to accept the opinion of the expert on its face value. I had found that there was nothing inherently incredible about the evidence of SP8 on his findings on
G the DNA profiling on the specimens analysed by him. And I noted too that there was no serious challenge mounted by the defence on the methodology as employed by SP8 in the course of his DNA analysis and definitely there was no introduction by the defence of rebuttal evidence of another expert to contradict SP8's
H opinion. In the absence of any credible challenge or rebuttal evidence to counter the credible scientific observations and findings given by SP8 forthcoming from the accused, the former's (SP8's) evidence had not been dislodged, let alone effectively rebutted and therefore, must be accepted as such by this court.

I

[47] It is to be recalled that the pathologist (SP5) had also been of the considered view that the death could also had been caused by the breaking of the 'hyoid' bone in the neck as a result of the deceased having been choked or strangled. The analysis of the Chemist (SP8) on the exhibits sent to him did not yield any discovery of any other male person's DNA profile on them apart from that which had originated from the accused. As such, the allegation contained in D64 that Roslan was present during the incident and the irresistible suggestion, though not in so many words in D64, that Roslan could be involved in the fatal attack on the deceased, was entirely baseless and could not be supported by the evidence as borne out by the DNA profiling as developed and analysed by SP8 on the exhibits. Such insinuation by the accused was a mere creation by him indeed and it had not cast any reasonable doubt on the prosecution's case. The DNA profiling had which had remained uncontroverted, had effectively eliminated Roslan's involvement in his case. Instead, from the independent evidence of SP8, the DNA profiles originating from the accused person had been found on most of the incriminating exhibits found by the Police Forensic team (CSI team) at the crime scene. In other words, the evidence had thus far shown that there had been quite a generous sprinkling of the accused's genetic fingerprints having been found to have been mixed with those of the deceased which inevitably must be taken, and justifiably so I must add, as damning against him.

[48] The learned counsel had also contended that the failure by the prosecution to produce fingerprints of the accused must necessarily be fatal against the prosecution. A short shrift to that can be found in the speech by Justice Chong Siew Fai CJ (Sabah and Sarawak) in the case of *PP v. Mansor Md Rashid* & Anor [1997] 1 CLJ 233 FC, where he was of the considered view that if they already existed sufficient positive evidence of the accused's identity, then the need for fingerprint evidence would not necessarily arise. In today's world of advanced forensic science, positive identification on a person can be achieved by way of techniques other than the 'traditional' mode of physical fingerprint uplifting and the comparisons made thereafter. Indeed, in the light the advent of DNA profiling technique, I ought not to be faulted if I were to offer the view that fingerprinting as the preferred mode of detecting criminals in an investigation, may well have past its heyday. In certain cases, in the absence of any other positive

A evidence relating to the identification of an accused person, fingerprint evidence may indeed prove to be critical and even conclusive in establishing as a fact such identity. But it is not in all criminal cases that the law of the land casts the obligation on the prosecution to adduce fingerprint evidence without fail. In this
B case, the presence of the overwhelming evidence in the form of positive mixed DNA profile match-up between the accused and the deceased, as per the uncontroverted testimony of SP8, has rendered the absence of physical fingerprints of the accused rather inconsequential, to say the least. There is also the evidence of
C SP11, Encik Sukri Palatturi, the off-duty security guard who said that he saw the accused at the staircase near the front area of the apartment unit in the afternoon of the date in question and so near in point of time to the time stipulated in the preferred charges against the accused, where the deceased was staying then
D with her friends Nurhanani Abdul Halim (SP3) and Zalina be Aziz (SP4). The piece of evidence which this court had accepted, as an established fact, had enhanced the high probability that the accused was indeed with the deceased during the time as stipulated in the said two charges. I therefore could see not much
E merit in the contention raised by the learned counsel in that regard. On the contrary, when read and taken together, the uncontroverted evidence of SP8 (the chemist), SP4 (Zalina Aziz) and SP6 (the arresting officer), the factum of the presence of the accused at the scene of crime and his identity had been proven
F beyond any reasonable doubt.

[49] In the case of *Nga Khan* AIR [1921] LB 4, the accused person killed a person by striking him with one blow to his head with a long and heavy bamboo. The nature of the injury indicated
G that great force was used. It was held that although the weapon used was not one that would of necessity cause fatal injury, the force used was so great as to show that the accused intended to cause injury sufficient in the ordinary course of nature to cause death, and that he was guilty of murder. Similarly, inflicting very
H serious injuries on highly vulnerable parts of the body of the deceased including the skull and where such injuries could not be said to be accidental or unintentional, was ruled to have amounted to murder, as the appellants in the case of *Mahadeo Ganpad Badawans* AIR [1977] SC 1998, had found out to their peril when
I their appeal against a conviction for murder, before the Indian Supreme Court was rejected. In this case before me, the blow to

the forehead (a part of the skull) of the deceased by the accused was so hard that the handle to the electric iron had broken as a result thereof and the nature of the injury was such that it had caused injury and bleeding to the deceased's brain that according to SP5 would in the ordinary course would cause death. Similarly, the strangulation of the deceased by the accused had caused the hyoid bone to break also causing death in the ordinary cause of death. According to SP5, the pathologist, both these kinds of injuries "dalam pengalaman saya lazimnya, menyebabkan kematian". As such, it is my finding that the accused person had intentionally and unlawfully caused the death of Siti Zawiah bte Sudin by inflicting on her injuries on critical parts of her person that he knew ordinarily in the course of nature would likely cause her death. SP5's evidence is conclusive on that score. And that had amounted to murder under s. 300 of the Penal Code.

[50] As regards, the offence of rape, I am satisfied that there was penetration by the accused person of his penis into the private part of the deceased. Before I proceed with my reason for saying so, it would be quite appropriate for me to reproduce verbatim, the relevant portion, in the notes of proceedings that had related to the examination of the pathologist, SP5 by the learned DPP regarding the issue:

TPR: Melihat kepada gambar P6(1) dan P6(J) tadi, bolehkah kamu beritahu mahkamah apakah cecair putih tersebut?

SP5: Ada dua kemungkinan. Pertama, ia mungkin cecair semulajadi kelamin si mati. Ataupun kedua, ia mungkin cecair itu adalah air mani lelaki. Ini hanya boleh dipastikan dengan ujian DNA.

TPR: Jika cecair putih itu sememangnya air mani lelaki, bagaimanakah ianya boleh berada di kelamin si mati?

SP5: Dengan adanya hubungan seksual sama ada rela atau paksa, sehingga lelaki itu sampai ke peringkat ejakulasi, dengan lelaki itu memasukkan kelamin lelakinya yang tegang ke dalam alat kelamin si mati.

[51] Now, I had said that there was penetration of the accused person's penis into the victim's private part because the specimen swab taken by SP5 from inside the inner wall of the victim's private part where the white fluid was detected and which was then sent to SP8 for analysis had shown the result that the DNA

A profile developed from the specimen was consistent with the DNA profiled from the accused's blood sample ('E24') and the conclusion must be that it had originated from the accused person. At this point it would be pertinent to pause and view the photographs that were referred to the pathologist SP5 by the B learned deputy. In those photographs that had been marked as P6(I) and P6(J) the white fluid (cecair putih) would appear to have 'collected' in the private part of the deceased. The SP5, upon being asked by the learned deputy as to how the white fluid could be found there, had said that it was through sexual C intercourse, either consensual or otherwise. Now, the accused in D64 had tried to again suggest that his DNA could have been there because of his fingering into the victim's private part. The part of the D64 on this matter is the part where the accused said that when he came to, he saw the deceased lying on the mattress D with her sarong having been pushed down to her ankles and that she was clad in only her underwear and a T-shirt. Upon seeing that, the accused said in D64 that he had proceeded to fondle her breasts and that he had then ejaculated in the direction of the deceased's private part. He also said that he had put his middle E finger into the deceased's private part twice. When he saw blood flowing out from the deceased's head he became panic and had quickly left the room.

[52] From the above, it is quite apparent to my mind that the F accused had tried to forward a theory that the white fluid could have been there as in the said photographs (P6K and P6J) as a result of his fingering the deceased's private part, having earlier on ejaculated in the direction of her private part. But the learned counsel did not cross-examine the pathologist on this point nor G suggest to him whether the white fluid was found where it was, had been due to other way(s) besides by way of sexual intercourse. As such, the accused's attempt in D64 in that direction, was a mere afterthought on the part of the defence. The recent case of *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236 H (Rayuan Jenayah no. 05-21/22-2007(P)) saw the Federal Court reiterating the long held principle that ought to be observed by counsel during cross-examination. In the course of his deliberation in *Tan Kim Ho*'s case *(supra)*, the learned Chief Justice had cited the House of Lords decision in *Browne v. Dunn (supra)* where it I was held that during cross-examination, there are two things which the opposing counsel has to undertake, namely: (i) he must

challenge a factual assertion made by the witness called by other party which is not in consonance with his brief, and (ii) he must put forth to the relevant witness called by the other party, what essentially his client's case is all about so as to give an opportunity for that witness to either agree or disagree with his proposition of what the case actually is all about, and if necessary, to rebut the same. These two principles are central to litigation, both in civil and criminal, and the learned Chief Justice had indeed opined in *Ho*'s case *(supra)* it should be observed ever the more so in criminal cases as in such cases, there are no mutual pre-trial discovery of salient facts between parties, as part from a professed defence of alibi, an accused person would normally keep his defence close to his chest. A failure to challenge a material factual assertion would amount to an acceptance of the same by the party against such factual assertion was given as explained by the Federal Court in the case of *Wong Swee Chin v. PP* [1980] 1 LNS 138. While failure to challenge a material fact or an omission to put forth the defence's case to the relevant witness may not, *ipso facto*, deal a fatal blow to a belated defence, nevertheless the courts have always regarded such an approach by the defence as one inherently lacking in credibility. It goes not to admissibility but rather, to the appropriate weight that ought to be given to such a defence. In the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 Justice Edgar Joseph Jr SCJ had this observation to make with regard to a belatedly disclosed defence, and I quote: "A final point needs to be made. The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witness, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention."

[53] So, from the failure on the part of the defence challenging the SP5 on his answers as reproduced above, it must in law be taken that he had agreed, as an accepted fact, that the white fluid was found in the deceased's private part as a result of a sexual intercourse, meaning that the accused had penetrated his penis

into the deceased private part and that he had ejaculated inside therein. His failure to put forth his defence, namely, putting his middle finger into her private part after first ejaculate in the direction of her private part to SP5 when the defence had the opportunity to do it during cross-examination but only belatedly asserted as such in D64 only served to impress upon this court that it was a line of defence that was created late in the day, probably out of desperation than anything else. I found that defence to be incredible and to be devoid of any grain of any honesty in it. That would dispose of the matter on penetration.

[54] The other part of the equation in an alleged rape charge involving an adult female would involve the issue of whether or not the victim had consented to the sexual intercourse. When SP5 was asked by the learned deputy regarding the existence of the white fluid ('cecair putih') in the deceased private part, he had answered thus:

> TPR: Jika cecair putih itu sememangnya air mani lelaki, bagaimanakah ianya boleh berada di kelamin si mati?
>
> SP5: Dengan adanya hubungan seksual sama ada **rela atau paksa**, sehingga lelaki itu sampai ke peringkat ejakulasi, dengan lelaki itu memasukkan kelamin lelakinya yang tegang ke dalam alat kelamin si mati. (emphasis added).

[55] Now, that answer by SP5 had brought into focus the pertinent issue of whether the sexual intercourse was consensual or otherwise, namely whether the deceased did in fact consent to having the sexual intercourse with the accused or otherwise. In this case, this court was not able to hear the evidence from the deceased on very this important issue for obvious reason. But that does not mean that this court is not entitled to look at the evidence adduced before it to see whether there exists circumstantial evidence that could support or justify a finding, one way or another, by this court on the issue of consent. Lest we forget, the burden is on the prosecution to show that this intercourse was non-consensual. In this regard, this court is of the view that the evidence of Chief Inspector Collin Babat [SP7] must be key. In his testimony, SP7 had said that having studied the scene of crime in the room, it was his conclusion that a struggle had taken place in the room, as evidenced by the fact that the room was in a mess and also based on exhibits which, in

their raw form, were tainted with bloodstains and suspected seminar fluids. He had also referred in court the photographs marked as P4(H), (I), (J), (K) and (L) to illustrate his point. In cross-examination, he said that the struggle would have involved at least two persons and agreed with the learned counsel that it might have involved more than two persons. Looking at the evidence led in this case, I agree with SP7 that there was a struggle that happened in that room. In the light of the other evidence as enumerated by me in the course of this judgment, apart from SP7's evidence, I also found that the struggle was between the accused and the deceased only. When SP7 had agreed with learned counsel that there could be more than two persons involved in the struggle, his conclusion may be based on sheer logic and he had not had the benefit of evaluating other evidence which had since been adduced before this court emanating from other witnesses, particularly the evidence of SP8, the chemist. As such, nothing adverse should be read into his evidence in that regard. For that matter, there is no reason for this court to doubt the veracity of his testimony taken in totality. Based on the available evidence before this court, it is my finding that the circumstances in this case had completely negated any semblance of consent having been given by the deceased to the accused in relation to the sexual intercourse that which to my mind had actually taken place between her and the accused. I had adverted to the defensive nature of the wounds and injuries suffered by the deceased and that these injuries had not been self-inflicted. The whole thing must of necessity be viewed as one whole transaction and the totality of the evidence had clearly depicted a scenario whereby the accused had violently assaulted the deceased and totally overwhelmed her before ravishing her against her will. The presence of the broken electric iron (P10B), the bloodied raffia string and the bloodied sheath of a knife, to my mind, plus the messy aftermath in the room, are clearly indicative of a struggle having taken place. I think the words of Azalin bte Aziz (SP4) when describing how Siti Zawiah had appeared to her summed it all, thus: "Seingat saya bila pintu bilek saya telah dibuka, saya lihat Siti Zawiah dalam keadaan terbaring dan kainnya terselak menampakknya kemaluan beliau. Baju juga terselak sehingga ke paras dadanya. Mukanya bengkak dan berdarah dan mulutnya macam dah pecah. Saya merasa amat sedih. Pintu pun ditutup kembali dan Nur Hanani pun talipon

A Polis." No one in his right mind would dare say with a straight face that the sexual intercourse between the deceased and the accused in this case had been consensual. In fact, the gruesome aftermath surrounding this case, as could be seen in the photographs marked as P6(E), P6(H), P6(R), P6(S) and P6(Y)
B had effectively negated any semblance of a consensual sexual intercourse having taken place in this case between them.

[56] In the final analysis, in the light of the overall evidence led in this court, and having applied the test as enumerated by Justice
C Suffian J (as he then was) it was my finding that this court could not believe the accused's version of events as enumerated by him in D64. Further, even at the lower threshold of creating a reasonable doubt, this court also found that he had failed to create any reasonable doubt on the prosecution's case with
D respect to both the charges preferred against him. I found that D64 had been conveniently created by the accused as an afterthought, solely for the purpose of trying to exonerate himself from these grave charges that he was facing in this case before this court.

E **[57]** It has been said that in order to convict an accused person for murder in a case based on circumstantial evidence, such evidence must be strong enough, if taken together to make a proverbial rope equally as strong, to hang the accused person. In
F this case, it was my considered view that the circumstantial evidence as admitted in this court had, taken together, formed a rope strong enough to hang the accused for having murdered Siti Zawiah bte Sudin on 9 March 2006. That rope was also strong enough to 'whip' and imprison the accused for having raped the same Siti Zawiah at the same material time. As earlier alluded by
G me, the D64 had not been able to cast any reasonable doubt on the prosecution's case on both the charges ad contained in P2 and P11. As such, para. (d) in Justice Suffian J's formula in *Mat v. PP*'s case *(supra)* was triggered in this case, namely that the
H accused must be convicted on both the charges, namely P2 and P11. As such, I found that the prosecution had succeeded in proving its case against the accused person beyond reasonable doubt on both the said charges in this case, as envisaged under s. 182A(2) of the Criminal Procedure Code.

I

[58] Premised on the above, I therefore had convicted the accused as per the charges as preferred against him on 7 September 2009. Having heard learned counsel on 8 September 2009 on mitigation for the rape offence, I had sentenced the accused, Muhammad Rasid bin Hashim to 18 years imprisonment and five strokes of the rotan under s. 376 of the Penal Code, as I could not see much in the plea of mitigation submitted on his behalf which would justify me to be lenient to him. Indeed, under the circumstances of this case, the element of violence was easily visible on account of the evidence as adduced before this court and on the balance of justice public interest would be better served by imposing the sentence which this court had imposed on the accused. To my mind, that sentence had in it both the punitive and deterrent elements so as to punish the accused as well as to deter would-be offender. I had ordered too, that the sentence of 18 years imprisonment for the offence of rape in P11 to run effective from the date of the arrest of this accused person. For the offence of murdering Siti Zawiah bte Sudin, I had sentenced him to death, under s. 302 of the same Penal Code, by hanging.